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Recognition of Foreign Governments and Its Effect on Private Rights*

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The effect of recognition or non-recognition of foreign governments was at one time a simple problem, compared to the situation that has prevailed during the past two decades. The change that has come about in recent years is mainly due to the change in the attitude which is taken by our Government and by some other governments with respect to according recognition to a new foreign government.

The principle announced by Jefferson and adhered to during the first half of the nineteenth century was "to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared." It was the fact of control rather than any other circumstance which was regarded as the decisive test.[1] However, the instructions to our foreign representatives gradually began to emphasize another consideration—the willingness and ability of a new government to honor foreign obligations of the state. These were the basic considerations in American foreign policy at least until the Civil War.

In 1861 Secretary Seward announced a somewhat different policy to the effect that a revolutionary government which gained control by sheer force of arms and in defiance of an existing constitution ought not to be recognized by the United States until it was assured that the change was adopted by the people rather than imposed upon them against their will. This idea found expression in American state papers, although the forms of utterance lacked uniformity. This principle seems also to have been adopted in connection with the recognition of the government of General Estrada in Nicaragua in 1911, and in the withholding of recognition from the government of General Huerta in Mexcio in 1913 and 1914, and later from the Tinoco government in Costa Rica.

In 1923 the United States Government participated in the Washington conference of five Central American republics (Guatemala, Honduras, Salvador, Nicaragua, and Costa Rica), which resulted in the adoption of the General Treaty of Peace and Amity of February 7, 1923,[2] Article II of which

*This Article is based on material used in an address by the Author before the International Law Section of American Bar Ass'n.

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1. "The policy of the United States, announced and practiced upon occasions for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power." Directions to the American minister in Colombia in 1890, 1 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 139.

2. (1923) 17 AM. J. INT. L. SUPP. 117.

provided that "the governments of the contracting parties will not recognize any other government which came into power in any of the five republics through a *coup d'etat* or a revolution against a recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country." Although the United States did not sign the conventions or adhere to them, Secretary Hughes later announced that the United States was in "hearty accord" with the policy of non-recognition announced in this treaty, and that its attitude would be governed thereby. This policy was later confirmed and followed as to the signatories to the Washington Treaty.[3] Soon, however, this treaty policy of non-recognition became the subject of severe criticism. It was objected to as a form of intervention in the domestic affairs of foreign countries and an unwarranted form of diplomatic pressure resulting in a violation of the rights of sovereignty. Consequently, certain exceptions were soon made by the parties to the treaty and by the United States.[4] This so-called doctrine of "legitimacy of origin" is clearly a departure from the principles laid down by Jefferson.

A further change in our national policy of recognition came about in the case of the Russian Revolution, which resulted in the overthrow of the Czarist government and the establishment of the Russian Socialist Federated Soviet Republic, on November 7, 1917. President Wilson refused to recognize the Soviet Government mainly on the grounds that it did not have the sanction of the Russian people, and that the United States would not recognize a government which refused to respect its international obligations.[5] President Coolidge liberalized, to some extent, the policy adopted by President Wilson.[6] He stated, however, that one of the principal objections to recognition of the Russian Government, was "the active spirit of enmity to our [American] institutions." In a later statement, Secretary Hughes adopted an uncompromising attitude and stated that "most serious is the continued propaganda to overthrow the institutions of this country. This Government can enter into no negotiations until these efforts directed from Moscow are abandoned."[7] Substantially the same attitude was taken by Secretary Kellogg and later by the Hoover Administration. But in October, 1933, President Roosevelt addressed a communication to the Soviet Government, referring to the abnormal relations then existing and inviting "frank friendly conversations" with the view of removing difficulties between the two nations.[8] As a result thereof, conferences were held in Washington

3. Secretary Kellogg's note declining to recognize the Chamorra Government in Nicaragua, N. Y. Times, Jan. 26, 1926, at 14.

4. Recognition of El Salvador, Department of State, Press Release, Weekly Issue No. 226, Jan. 27, 1934, Publication No. 554, at 51. Elsewhere in Latin America the United States has followed its traditional policy, as for example, in the recognition during recent years of governments in Bolivia, Peru, Brazil, Panama, Argentine, and Cuba.

5. Dewar, *Britain's Recognition of the Soviet Government* (Dec. 15, 1924) 3 FOREIGN AFFAIRS 316.

6. 65 CONG. REC. 451 (1923).

7. *Ibid.*

8. Department of State, Press Release, Weekly Issue No. 212, Oct. 21, 1933, Publication No. 517, at 226.

early in November, 1933, participated in by representatives of the United States Government and the Soviet Government. On November 16, 1933, President Roosevelt addressed a note to Mr. Litvinoff, Russian Commissar for Foreign Affairs, which gave recognition to the Soviet Government.

Thus, over a period of sixteen years, our government refused to recognize the Soviet regime, not on the grounds that that regime did not exercise control and authority in the territory of the former Russian Empire, but for other purely political reasons.

Consequently there resulted an anomalous situation which prevailed during that period. Admittedly there existed in Russia a government exercising control over its own people and territory. Americans continued to trade with Russia and to travel in Russia. Thousands of Russian-born aliens were admitted to the United States under the immigration laws, and many of them were admitted to citizenship in the United States.[9] Documents were executed in Russia for use in the United States and were accepted by American courts as officially authenticated.[10] The United States Government participated in international conferences and conventions, in which the Soviet Government officially took part.[11] The Soviet Government was accorded *de facto* and *de jure* recognition by numerous other sovereign states.[12] But all the while recognition was refused by the Government of the United States.

By far the larger body of our law in recent years with respect to the effect of recognition and non-recognition, relates to the questions arising out of the Russian situation. It is for that reason that this discussion is devoted mainly to the disputes between those two governments and their nationals.

This situation necessarily gave rise to many legal disputes, resulting in a large amount of litigation in American courts. Thus, before and since recognition, our courts have been presented with difficult and complicated questions. Because of the anomalous and unprecedented situation, it is not surprising that many of the courts' decisions lack clarity and consistency.[13]

One of the first questions that arose was as to the unrecognized government's standing in court. In this connection, it is interesting to note that the courts have adhered to the distinction between a "state" and a "government." The Constitution of the United States extends the judicial power to controversies between "a state or the citizens thereof and foreign states." In a case involving Mexico, decided a few months before recognition was extended to the Mexican government, a Superior Court of Massachusetts (Essex County, May, 1923) entertained a suit by the "United States of Mexico," although there was then no recognized government of Mexico.

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9. ANNUAL REP. COMM. OF NATURALIZATION (1930).

10. Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36 (1930).

11. As to whether this involved recognition of the Soviet government, see Hudson, *Recognition and Multipartite Treaties* (1929) 23 AM. J. INT. L. 126.

12. See (1934) 28 AM. J. INT. L. 97, for a list of such states.

13. On the general subject, see HUDSON, CASES ON INTERNATIONAL LAW (2d ed. 1936) 77 *et seq.*

The court, however, adverted to the possibility that pending negotiations might soon result in recognition. In the case of Russia, the United States government not only declined to recognize the Soviet Government, but continued to recognize officials of the old defunct Provisional Government. Hence the courts permitted the representatives of the old government to institute and maintain actions in the name of the "Russian Government," later changed to "State of Russia."[14] This principle of continuity of the life of the "state" finds general acceptance both in judicial decisions,[15] and in the writings of authorities on international law.[16]

On the other hand, prior to recognition, the courts denied the Soviet Government any standing in court, and refused to permit it to sue.[17] The Court of Appeals of New York said that the right of a foreign state to sue in American courts rests, in the absence of treaty, on international comity, and in the absence of recognition comity did not exist. The court further stated that it would be against public policy to permit an unrecognized government to recover funds which might be used against the interests of the United States.

Likewise, a suit against the Russian Government was not allowed.[18] The New York Court of Appeals stated that although there existed no comity, the acts of a *de facto* government cannot be questioned by our courts, and further that the Soviet Government had not submitted itself to our law. It would, indeed, be a dangerous practice to permit our courts to entertain private claims against foreign governments, recognized or unrecognized.[19]

Nor is the principle of immunity of a *de facto* sovereign government[20] limited to cases in which an attempt is made to bring the "person" into court, i. e., the government, as such: it was applied in a case in the United

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14. Russian Government v. Lehigh Valley R. R., 293 Fed. 135 (S. D. N. Y. 1923), *aff'd sub nominee*, Lehigh Valley R. R. v. State of Russia, 21 F. (2d) 396 (C. C. A. 2d, 1927); State of Russia v. National City Bank, 69 F. (2d) 44 (C. C. A. 2d, 1934). There is some doubt, however, as to whether under the Soviet constitution the present Russian state is the same entity in contemplation of law as the old Czarist state. That the Soviet Republic is a new state, and that the Soviet Government is not the successor of the Czarist Government in the old State of Russia, is the view taken by BATY, CANONS OF INTERNATIONAL LAW (1930) 229.

15. The Sapphire, 78 U. S. 164 (1870); Rose v. Himely, 4 Cranch 241 (1808); Lepeschkin v. Gosweiler & Co., Switzerland, Federal Tribunal, 1923; 71 JOURNAL DES TRIBUNAUX ET REVUE JUDICIAIRE 582, translation in HUDSON, CASES ON INTERNATIONAL LAW (2d ed. 1936) 122.

16. 1 OPPENHEIM, INTERNATIONAL LAW (3d ed. by Roxbury) § 77.

17. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N. Y. 255, 139 N. E. 259 (1923); the Rogday, 279 Fed. 130 (N. D. Cal. 1920); The Penza, 277 Fed. 91 (E. D. N. Y. 1921).

18. Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24 (1923). See also Nankivel v. Omsk All Russian Government, 237 N. Y. 150, 142 N. E. 569 (1923).

19. Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338, 349; Dickinson, *The Unrecognized Government or State in English and American Law* (1923) 22 MICH. L. REV. 118, 126.

20. The distinction between *de facto* and *de jure* governments is challenged by some writers. See Borchard, *The Unrecognized Government in American Courts* (1932) 26 AM. J. INT. L. 262.

States District Court for the Southern District of New York[21] in which the plaintiff asserted title to gold found in possession of the defendant, which gold had been confiscated by the Soviet Government and thereafter shipped to the defendant. The court held that a soverign could not be brought into court without its permission, and that the court could not pass on the title to property claimed by a sovereign, regardless of whether such sovereign had been recognized, since its existence might be proved in other ways than by recognition.

The cases indicate, therefore, that the principle of immunity is not dependent upon diplomatic recognition. On the other hand, the right of a foreign government to sue in our courts is dependent upon recognition. That right does not follow from sovereignty alone, but exists by virtue of comity, which, in turn, is dependent upon the existence of friendly diplomatic relations.

But when we come to deal with private rights, the questions are much more complicated and difficult. It is in this field that the greatest contribution has been made to the development of the law in respect to the recognition of foreign governments. By far the larger number of cases have been concerned with the rights of individuals and corporations as affected by the acts, laws and decrees of unrecognized governments, particularly the Soviet Government. The decisions in this field have presented some glaring inconsistencies. This, however, might be regarded as inevitable, because of the complexity of the situation and its unprecedented character.

The often stated rule that recognition is a political matter, and that the courts are bound by the action taken by the political branch of the Government, has been found to be of little assistance to the courts in the recent past. Our courts have been faced with a situation in which our government denied recognition to a foreign government that was admittedly a *de facto* government in complete control of the territory in which it operated. The laws and decrees of the *de facto* government gave rise to many rights and duties which could not in justice be ignored elsewhere. It has been found, therefore, that former precedents could not be rigidly followed in dealing with problems presented by the Russian situation. The Civil War furnished precedents which gave some lead when this new situation arose. In the case of *Texas v. White*,[22] the Supreme Court said:

> ". . . Acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government. . . ."

21. Banque de France v. Equitable Trust Co., 33 F. (2d) 202 (S. D. N. Y. 1929).
22. 7 Wall. 700, 19 L. Ed. 227 (1868).

The Civil War situation, however, has never been regarded as a satisfactory precedent, for the courts have conceded to the Soviet Government a greater degree of actual sovereignty than was ever conceded with respect to the Confederate States. The Civil War cases were concerned mainly with the protection of the property and contract rights of loyal United States citizens, while in recent years the courts have, in some instances, denied effect to the Soviet decrees, even when the result was that United States citizens were made thereby to suffer. Contrary to statements contained in certain reviews of this recent period, American citizenship, as such, and the protection of American nationals, has not been a determining factor in the cases in which the Soviet decrees were given or denied effect. The nationality of the parties has usually been deemed immaterial. A review of recent cases does indicate, however, a considerable advance in the treatment which the courts have given to the subject of the effect of the acts and decrees of an unrecognized *de facto* government, as bearing upon private rights. The courts have assumed that recognition is a political function, and that the decision of the political department of the Government is conclusive upon the courts.[23] But they have also held and correctly, that it does not follow that the courts cannot take account of facts as they exist under a *de facto* regime and of the legal consequences flowing therefrom.

The New York Courts, which have had to deal with by far the larger number of these cases, have, in this connection, adopted certain broad principles which indicate a realistic approach to the problem. Two main problems were presented: (1) that of the status of the Russian companies that were nationalized by the Soviet Government; (2) assuming the continued legal existence of such companies after their nationalization, the rights of particular persons to represent them in litigation.

The practical difficulty which the courts faced was that to apply the ordinary rules of law to the Russian situation and to deny the old Russian corporation any standing in court, and at the same time to deny the Soviet Government any standing in court, would, in many cases, result in a debtor's being relieved of the debt entirely.[24] To avoid this unjust result, the courts here and abroad were distinctly inclined to invoke some theory which would permit a recovery. In the beginning, however, the American courts refused to give effect to the acts and decrees of the Soviet Government on the ground of non-recognition and consequent absence of comity. In the case of *James v. Second Russian Insurance Company*,[25] the lower court expressly said that it would not recognize a Soviet decree nationalizing the defendant insurance company in Russia, "because of non-recognition by our Federal authorities."

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23. Rose v. Himely, 4 Cranch 241 (1808); Jones v. United States, 137 U. S. 202 (1890); Ricaud v. American Metal Co., 246 U. S. 304 (1918).

24. There was, and still is, a considerable amount of litigation in the New York courts with respect to funds deposited in New York banks, trust companies, and with the Superintendent of Insurance, as security and in trust for creditors, policy holders, etc. The New York courts authorized liquidation proceedings to dispose of these deposits, by first paying local creditors, and then subjecting the residue to foreign claims.

25. 239 N. Y. 248, 146 N. E. 369 (1925).

This rigid view was soon modified, and the New York courts adopted the criterion of public policy in relation to the Soviet decrees. In the leading New York case of *Sokoloff v. National City Bank of New York*,[26] plaintiff, a Russian, sued the defendant bank upon a contract to open a bank deposit in the defendant's Petrograd branch. It was held that the Soviet decrees confiscating the defendant's property in Russia and terminating its business there, was not a defense. However, in his opinion, Chief Judge Cardozo delivered the following dicta which have since received much attention:

> "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War."

He then suggested a rule, based on the analogy of the Civil War cases, which might govern the situation in hand:

> ". . . a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done."

He reached the conclusion, however, that in the situation before him no public policy required giving effect to the Russian decrees.

In the later case of *Russian Reinsurance Company v. Stoddard and Bankers Trust Co.*,[27] the New York Court of Appeals made a departure from the rigid rule that acts and decrees of unrecognized governments cannot be applied in the United States. The defendant there claimed that the plaintiff's existence had been terminated by the Soviet decree nationalizing insurance companies and confiscating their property. The court held, in part, that since the Soviet Government might thereafter sue the defendant upon the same claim either in the United States or in some country which recognized the Soviet Government and in which the defendant bank was doing business, the defendant (in a suit in equity) should not be subjected to the danger of such a double liability. The plaintiff was, therefore, not allowed to recover. In other words, it would be against justice and public policy, in that particular case, to deny validity to the decree of the Soviet Government.

However, in later New York cases (actions at law, in which the defense of double-liability was not admitted), it was held that the Russian companies continued to exist, in spite of the Soviet decrees of nationalization, at least to the extent and for the purpose of recovering money or property which

26. 239 N. Y. 158, 145 N. E. 917 (1924); 250 N. Y. 69, 164 N. E. 745 (1928).
27. 240 N. Y. 149, 147 N. E. 703 (1925).

was owed to the old corporation.[28] It was stated that "the corporation survives in such a sense and in such a degree that it may still be dealt with as a *persona* in lands where the decrees of the Soviet Republic are not recognized as law."[29] In these cases, however, the courts indicated that their decisions were based upon particular grounds limited to the type of case which they were then considering.

Recognition, when it came in November, 1933, did not make any appreciable difference in respect to the treatment given by the courts to the question of the status of the former Russian corporations seeking to collect debts and property owing to the former corporation.[30] In the case of *Vladikavkazsky Railway Company v. New York Trust Company*,[31] it was similarly held, after recognition, "that although the corporation in question was extinguished in its homeland and there dead in the eyes of the law, it continued its existence as 'a juristic person with capacity to sue' in this State." Here again, the court stressed considerations peculiar to this case—the fact that the contract in question, a bank deposit, was made in New York, was to be performed in New York entirely outside Russian jurisdiction, and hence was governed by the law of New York, and further that it would be against the public policy of the State of New York to permit a debtor to hold the property of its creditor indefinitely.

There are some cases, however, in which the New York courts did not hesitate to give full force and effect to the decrees of the Soviet Government. In the case of *Dougherty v. Equitable Life Assurance Society*,[32] the Court of Appeals held the defendant not liable on contracts of insurance made and to be performed in Russia, which contracts were cancelled by decrees of the Soviet Government. It is interesting to note that some of the policy holders were American citizens. In *Salimoff v. Standard Oil Company*,[33] the court held that the plaintiff had been completely divested of all interest in certain lands in Russia by virtue of Soviet decrees confiscating the lands, which lands were later sold to the defendant.

The *Salimoff* case was decided by the New York court prior to recognition; the *Dougherty* case was decided after recognition. The fact of recognition, however, seems to have made no real difference in the *rationale* of the court's decisions.[34] In both of these cases the situs of the property

28. Joint Stock Co. v. National City Bank, 240 N. Y. 368, 148 N. E. 552 (1925); First Russian Insurance Company v. Beha, 240 N. Y. 601, 148 N. E. 722 (1925); Petrogradsky M. K. Bank v. National City Bank, 253 N.Y. 23, 170 N. E. 479 (1930).

29. Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23, 36, 170 N. E. 479, 484 (1930).

30. The principle of retroactivity, as applied to the validity of the acts and decrees of the foreign government when recognized, is now generally admitted. Oetjen v. Central Leather Co., 246 U. S. 297 (1918); Ricaud v. American Metal Co., 246 U. S. 304 (1918).

31. 263 N. Y. 369, 189 N. E. 456 (1934).

32. 266 N. Y. 71, 193 N. E. 642 (1934).

33. 262 N. Y. 220, 186 N. E. 679 (1933).

34. However, in the *Salimoff* case, the court did point out that the Department of State had taken cognizance of the *de facto* existence and authority of the Soviet Government.

or contract was wholly within Russia and governed exclusively by Russian law. It would seem, therefore, that these cases might well have been decided by the application of the familiar principles of conflict of laws. But the New York court chose to rely upon the more difficult and uncertain theory announced in the dictum of the *Sokoloff* case, wherein the test was whether "violence to fundamental principles of justice or to our own public policy might otherwise be done."

The courts of Great Britain, France, Italy, Switzerland, and Germany have also had to deal with questions arising out of the Russian situation. Those countries gave recognition, *de facto* or *de jure*, to the Soviet Government long prior to the time when recognition was accorded by the United States Government. It is, therefore, interesting to note the manner in which those foreign courts dealt with the situation.

In England, which gave *de facto* recognition to the Soviet Government in 1921 and *de jure* recognition in 1924, the courts at first gave full effect to the decrees of the Soviet Government.[35] Later, however, they became more cautious in applying the Soviet nationalization decrees. For a time the House of Lords took the view that the decrees were mere declarations of policy rather than legislative measures, and held that they did not terminate the life of the Russian corporations, at least not the branches in Great Britain.[36] Later, however, and on the basis of more complete evidence, the House of Lords held that the Soviet nationalization decrees did terminate the corporate existence of certain Russian banks.[37] In *Perry v. Equitable Life Assurance Society*,[38] it was held that the plaintiff could not recover on a life insurance policy issued in Russia, and payable in Russia, because of the Soviet nationalization decree which cancelled all life insurance contracts in Russia and confiscated the property and assets of the insurance companies. Thus the English court gave full effect, in England, to the Soviet decree cancelling a Russian contract—and this, in spite of the fact that defendant had assets in England and in the jurisdiction of the court.

France recognized the Soviet Government in 1924. Prior to recognition the French courts gave no legal effect to the Soviet decrees of nationalization.[39] Since recognition the nationalization decrees have been given effect in the French courts, and Russian corporations are deemed to have been dissolved in Russia.[40] However, the French courts do make an exception,

35. Luther v. Sagor, (1921) 3 K. B. 532; Sea Ins. Co. v. Russia Ins. Co., 17 Lloyds List L. R. 316 (1923).

36. Banque Internationale v. Goukassow, (1925) A. C. 150; Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, (1925) A. C. 112.

37. Lazard Bros. and Co. v. Midland Bank, Ltd., (1923) A. C. 289; In re Russian Bank for Foreign Trade, 1 Ch. D. 745 (1933); Russian and English Bank v. Baring Bros., 52 T. L. R. 393 (1936).

38. 45 T. L. R. 468 (1929). But *cf.* Buerger v. N. Y. Life Ins. Co., 43 T. L. R. 601 (1927) in which a contrary conclusion was reached, on the basis, however, of uncontradicted testimony as to Russian law.

39. Hornstein v. Banque Russo-Asiatique, 54 Clunet 1075 (1927); Kharon v. Banque Russe pour le Commerce et l'Industrie, 50 Clunet 533 (1923).

40. André v. La Union et le Phenix Espagnol, 53 Clunet 126 (1926).

in this regard, in a case in which the Russian corporation has attained a *de facto* existence in France either by substantial localization in France or by reconstitution under French law.[41] In some cases the French Courts have held it contrary to the public policy of the forum to give effect to the decrees of confiscation, as distinguished from dissolution.[42]

Germany gave *de jure* recognition to the Soviet Government in 1922. The courts of Germany wavered, and in some instances reversed themselves, on the effect of the Soviet decrees. The prevailing view seems, however, to give effect to the Soviet decrees, and to hold that Russian corporations did not continue as legal entities capable of suing in the German courts.[43]

In Switzerland, although that government had not then recognized the Soviet Government, the highest legal tribunal held that the Soviet nationalization decrees terminated the legal existence of the corporation, and refused to let a Swiss branch of the Russian corporation maintain a suit, "the existence of a branch being impossible without the principal office upon which this secondary place of business depends."[44] However, in later cases a more liberal view was taken with respects to the Swiss assets of a Russian company.[45]

The Italian courts refused to apply the Soviet decree nationalizing the commercial fleet, on the ground that it was contrary to the public order of Italy.[46]

Thus there appears to be some conflict between the American and the foreign decisions, particularly in regard to the dissolution of Russian corporations by the Soviet decrees. This conflict would seem not to depend upon the recognition and non-recognition of the Soviet Government, but rather upon a difference in the application of principles of conflict of laws.

On the whole, the courts here and elsewhere have been inclined to minimize the significance of recognition, at least to the extent of protecting the rights of individuals. It was, perhaps, inevitable that in attempting to arrive at substantial justice in each particular case with its peculiar facts, certain inconsistences should exist. Considering the novel and extremely difficult character of many of the problems presented, it would seem that the recent development of the law with respect to recognition and non-recognition has been as satisfactory as could reasonably be expected. On

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41. Banque Générale de Commerce v. Jaudon, 52 Clunet 419 (1925); Banque Russo-Asiatique, 54 Clunet 352 (1927).

42. Etat Russe v. Cie Russe de Navigation (Ropit), Trib. Comm. Marsaille, 52 Clunet 391 (1925), Court of Appeal of Aix, 53 JOURNAL DU DROIT INTERNATIONAL 667 (1925), 53 Clunet 667 (1926), Cour de Cassation, 55 Clunet 674 (1928), translation in HUDSON, CASES ON INTERNATIONAL LAW (1929) 137. This case involved a Soviet decree purporting to nationalize certain ships of the former Russian Commercial Fleet, then lying in French ports.

43. Ginsberg v. Deutche Bank, Juristische Wochenschrift 1232 (1928).

44. Banque Internationale de Commerce de Petrograd v. Hausner, 52 Clunet 488, 489 (1923).

45. Prochorov v. Sulzer, Federal Supreme Court, Ost. R. Z. 1930, 541 (1929).

46. Nomis de Pollone et Svarono Fatis v. Cooperative Garabaldi Federazione Italiana Lavoratori del Mare, 52 Clunet 225 (1925). *Cf.* Cap. Katsikis v. Sociétá Fati Svorone de Pollone, Tribunale di Genoa, 50 JOURNAL DU DROIT INTERNATIONAL 1021 (1923).

the whole the judiciary has adopted a fairly realistic attitude toward the entire problem. While the courts have withheld from unrecognized governments the rights which clearly depend upon recognition, they have not regarded the government's refusal to give recognition as conclusive on the question of the factual existence of the foreign sovereign and the legal consequences of its acts. Very properly, when the fact was not clear, as in some of the Mexican cases, the courts relied upon the executive's finding of fact. When, however, as in the case of Russia, the executive's decision as to recognition bore no relation to the admitted factual existence of the foreign government and its sovereignty over its territory, the courts have faced the facts squarely. The courts have in numerous instances accepted the facts, in preference to political theory, and have given to the facts their legal consequences, regardless of political non-recognition of the Government. In doing that, however, it has not generally been thought that the courts were meddling or interfering with the exclusive function of the executive in the conduct of our foreign relations.

Although the decisions in most of the cases may have been just and warranted by the unprecedented character of the problem, the reasons for the decisions, as given by the courts, have not been entirely satisfactory. The test suggested by the New York Court of Appeals in the *Sokoloff* case and later applied in other cases, namely, that the acts and decrees of an unrecognized foreign government may be given effect by our courts "if violence to fundamental principles of justice or to our own public policy might otherwise be done," can hardly serve as a workable general principle. Although it may result in substantial justice, as indeed it has in particular cases, it is, nevertheless, subject to serious objection because of its uncertainty and its susceptibility to varying interpretation. Furthermore, as recent cases illustrate, it raises serious question as to judicial competence.

It is believed that the ordinary principles of conflict of laws will suffice in the solution of most of the problems that arise in connection with the effect of the acts and decrees of foreign governments, recognized or unrecognized, if their factual existence be undisputed. It is, of course, universally admitted that the acts and decrees of a foreign government do not *ex proprio vigore* have any extra-territorial effect. But in certain situations, under ordinary principles of conflict of laws, our own law does give certain force and effect to foreign laws; in doing so, the foreign law is merely regarded as one of the facts in the situation.[47] Let us take, for example, a marriage entered into abroad. The validity of that marriage, under our own law, depends upon its validity where solemnized.[48] A marriage which has taken place in Russia, though perhaps not in accordance with the procedure prescribed by our own law, may nevertheless be regarded as valid

47. See 1 BEALE, CONFLICT OF LAWS (1935) § 5.4; GOODRICH, CONFLICT OF LAWS (1927) § 6; RESTATEMENT, CONFLICT OF LAWS § 1.

48. 2 BEALE, *op. cit. supra* note 47, § 121.2; GOODRICH, *op. cit. supra* note 47 § 113.

here.[49] Hence the foreign law is applied in determining the validity of the marriage, not because the foreign law has any force here, but because our law determines the question of the validity of the contract by the *lex loci contractus*. The foreign law is proved as one of the facts, and our own law is then applied thereto. It would seem to be of little consequence, therefore, that our Government has refused to enter into diplomatic relations with the foreign government under whose laws the marriage was solemnized. In thus solving the problem, the courts are not helping the foreign government to enforce its laws, but are merely enforcing our own conception of the rights of the parties.

Of course, the cases with which our courts have had to deal are not so simple as the marriage contract illustration. Nevertheless, it is believed that the usual principles of conflict of laws will meet most situations.

However, serious questions have arisen because of certain exceptions which some courts have made in the application of conflict of law principles, namely, the exception of "public policy." It has been said that reference to the foreign law may be rejected where inconsistent with the public policy of the forum.[50] Questions as to "public policy" have arisen both before and since the United States Government accorded recognition to the Soviet Government. It is directly involved in many of the cases now pending in our courts which arose out of the Russian situation. The public policy in question relates primarily to the confiscation effected by the Soviet Government. This is the principal issue in certain cases which are now pending

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49. There seems to be no decision directly in point. However, in Banque de France v. Equitable Trust Co., 33 F. (2d) 202, 205 (S. D. N. Y. 1929), there is dictum to the effect that "a marriage which is valid under laws of the present government in Russia is quite universally regarded as valid in this country." Accord, Nachimson v. Nachimson, 143 L. T. R. 254 (1930). *Contra:* Jelinkova v. De Serbouloff, Pasicrisie Belge (1926), III, 131, 54 Clunet 189, ANNUAL DIGEST, 1925-1926, Case No. 20; Chiger v. Chiger, 53 Jour. de Droit Int. 943 (1926); ANNUAL DIGEST, 1925-1926, Case No. 18; Soviet Marriages in Hungary Case, ANNUAL DIGEST, 1925-1926, Case No. 22.

50. Aside from the recognition cases discussed in this article, the "public policy" exception raises interesting questions generally, and particularly in relation to foreign marriage and divorce, already referred to. An interesting problem is presented in determining the effect to be given here to a polygamous or incestuous marriage contracted in a foreign jurisdiction in accordance with the law of that jurisdiction. Although it is generally assumed that such a marriage is contrary to public policy in this country, in a recent opinion of the Attorney General of the United States, a marriage between an uncle and his niece contracted in Poland in accordance with Polish law, was accepted as creating a status of husband and wife in this country, for the purpose of admission under the immigration law. The headnote to the opinion reads as follows: "A man, while a citizen of the United States and a resident of the State of Virginia, married his niece in Poland, and later petitioned the Secretary of Labor for the issuance of an immigration visa for his alien wife under section 4(a) of the Immigration Act of 1924. The Secretary of Labor approved the petition and accorded the wife the status of a non-quota immigrant. *Held*, that, as the marriage between the uncle and his neice was lawful in Poland, and as the uncle and his neice may maintain the relation of husband and wife at the place of his residence in Virginia, provided the uncle left Virginia for Poland without any intention of marrying his niece, there is no legal ground for refusing to accept the certificate of the Department of Labor as to the wife's status." 37 OPS. ATT'Y GEN. 102 (1933).

in both the State[51] and United States courts,[52] in which the issues arose as follows: as a part of the agreements whereby the United States accorded recognition to the Soviet Government, the latter assigned to the United States Government all of its claims, as successor of prior governments or otherwise, against American nationals, including its claim to assets in this country, which assets were formerly owned by Russian corporations which had been nationalized and their property confiscated by the Soviet Government.[53] The United States Government, as assignee, is now suing, under this assignment, to recover funds found here. The principal defense asserted is that it is contrary to American public policy to give effect, even indirectly, to the Soviet decrees of confiscation. In these pending suits the question is further complicated by the fact that the United States Government is itself the plaintiff, and alleges the assignment of the Soviet Government as its source of title.

The public policy concept is indeed wrapped in considerable vagueness, and has therefore given rise to a sharp conflict in judicial expression on the subject. For instance, the New York Court of Appeals[54] recently said:

> "The principle which determines whether we shall give effect to foreign legislation is that of public policy. . . . That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts."

On the other hand, in a recent case in a Federal court,[55] it was stated as follows:

> "When, therefore, the Soviet Government was recognized, the courts lost all right to continue to inject their prerecognition conceptions of public policy into the international panorama in manifest derogation of the express determination of the political department and the clear juridical implications of the act of recognition. . . . To impeach this legislation now in the courts as being against our public policy would clearly trench upon the sphere of the executive who has already decided the matter in a manner that concludes our courts."[56]

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51. Moscow Fire Ins. Co. v. Bank of New York & Trust Co., pending in the New York Supreme Court, New York County.

52. United States v. Morgan Belmont, 85 F. (2d) 542 (C. C. A. 2d, 1936).

53. See note of the Soviet Ambassador (Troyanovsky) to the Secretary of State, dated July 21, 1936, with respect to the scope of the Assignment of November 16, 1933. This note appears in the record of the case of Moscow Fire Ins. Co. v. Bank of New York & Trust Co., now pending in the Supreme Court of New York County.

54. Vladikavkazsky Ry. v. New York Trust Co., 263 N. Y. 369 (1934).

55. Opinion of Manton, C. J. (dissenting on another point) in United States v. Bank of New York and Trust Co., 77 F. (2d) 866 (C. C. A. 2d, 1935).

56. In a case involving confiscation by a revolutionary government in Mexico, the Supreme Court of the United States said: "To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the act of the government of another

The cases which have been presented to our courts, therefore, raise interesting questions as to the existence and extent of the public policy exception to the application of the ordinary rules. Who is to determine the public policy that is to be applied? Where there is a local, as distinct from a national, public policy, which is to prevail? Does the action taken by the President of the United States in according recognition to the Soviet Government and accepting an assignment of its claims, constitute a declaration of national policy? Are certain constitutional and legislative declarations and prohibitions, obviously directed to action by the State or Federal Government, to be taken as controlling with respect to legislation enacted by a foreign government? These are some of the questions which the so-called "recognition cases" present, and which remain to be passed upon by the Supreme Court of the United States.[57]

Obviously, the granting of recognition by the United States Government has not solved most of the legal questions. It has, of course, had the effect of giving to the Soviet Government a standing in our courts. It has also eliminated certain problems as to the right of representation of the State of Russia. But most of the questions as to private rights still remain and to a considerable extent are unaffected by recognition. These are problems which challenge the attention and ingenuity of the bar generally.

The frequent occurrence in recent years of changes in governments throughout the world and the divergence in national policy of various governments with respect to the recognition of new governments, have created an anomalous situation resulting in much legal confusion. The legal principles and rules applicable are in need of clarification, particularly as concerns the nature of recognition and the legal effects of non-recognition. It is believed that the subject now calls for study and discussion, particularly by those now engaged in the restatement of the American law and the preparatory work looking toward the codification of international law.

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done within its own territory'." Oetjen v. Central Leather Co., 246 U. S. 297, 303 (1918). When this question arose in an English court, the following statement was made: "But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a *casus belli*; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized." Luther v. Sagor, (1921) 3. K. B. 532, 558.

57. The case of United States v. Bank of New York & Trust Co., 296 U. S. 463 (1936), went off solely on the question of jurisdiction of the Federal court. The merits of the case were not touched upon by the Supreme Court.